Yeap Boon Hai v Public Prosecutor

FEDERAL COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05–4 OF 2008(B)
ARIFIN ZAKARIA CJ (MALAYA), MOHD GHAZALI AND JAMES FOONG FCJJ
6 JANUARY 2010

Criminal Law — Penal Code — s 300 — Murder — Definition of — Whether actions of accused so imminently dangerous that such action in all probability would cause death

The appellant allegedly set ablaze a shop house killing six persons. He was tried at first instance on six counts of murder. The prosecution's case almost entirely proceeded on circumstantial evidence, which the trial judge found had established a prima facie case. The appellant was called to enter his defence. The trial judge rejected the defence, convicted and sentenced the appellant to death. The appellant's appeal to the Court of Appeal was dismissed. The appellant thus appealed to the Federal Court. The issues for the determination were whether: (i) the circumstantial evidence was sufficient to convict the appellant for murder; and (ii) whether the appellant's actions fell within the definition of culpable homicide under s 299 of the Penal Code ('Code'), or under murder as defined by s 300 of the Code.

Held, dismissing the appeal:

(1) The trial judge's finding that the fire was caused by petrol and that it was the appellant who started the fire ought not to be disturbed. Such finding was based on actual evidence and corroborated on material particulars through inferences reasonably and properly drawn from other evidence. On the facts, the trial judge had correctly rejected the appellant's defence (see paras 17 & 19).

(2) The appellant in this case may have had no intention to cause the death or any bodily injury as was likely to cause death to the occupiers of the shop house. Nevertheless, judging from the time and manner in which the fire was started, in all circumstances the appellant's actions were so imminently dangerous to human life that in all probability his actions would cause death. Death was a practical certainty. The appellant's action thus fell squarely within the definition of murder under s 300 of the Code (see paras 23 & 25); *Hyam v Director of Prosecutions* [1975] AC 55 (HL) followed.

[Bahasa Malaysia summary

Perayu telah dituduh membakar sebuah rumah kedai yang menyebabkan kematian enam orang. Pada mulanya dia dibicarakan atas kesalahan membunuh seramai enam orang. Kes pihak pendakwa diteruskan hampir sepenuhnya berdasarkan keterangan keadaan, yang mana hakim bicara telah memutuskan bahawa pihak pendakwaan telah berjaya membuktikan kes prima facie. Perayu dipanggil untuk membela diri. Hakim bicara menolak pembelaannya, mensabitkan dan menghukum perayu dengan hukuman mati. Rayuan perayu ke Mahkamah Rayuan ditolak. Oleh itu perayu merayu ke Mahkamah Persekutuan. Isu-isu yang harus diputuskan adalah: (i) sama ada keterangan keadaan tersebut mencukupi untuk mensabitkan perayu dengan tuduhan membunuh; dan (ii) sama ada tindak tanduk perayu termasuk dalam tafsiran homisid salah di bawah s 299 Kanun Keseksaan ('Kanun'), atau di bawah kesalahan membunuh seperti yang ditafsirkan oleh s 300 Kanun.

Diputuskan, menolak rayuan:

(1) Keputusan hakim bicara bahawa kebakaran tersebut diakibatkan oleh minyak petrol dan bahawa perayu yang memulakan kebakaran tersebut tidak harus diganggu. Keputusan tersebut dibuat berdasarkan keterangan sebenar dan disokong atas butiran material melalui inferens-inferens yang wajar dan tepat disimpulkan daripada keterangan lain. Atas fakta-fakta, hakim bicara dengan tepatnya telah menolak pembelaan perayu (lihat perenggan 17 & 19).

(2) Perayu dalam kes ini mungkin tiada niat untuk menyebabkan kematian atau kecederaan yang memungkinkan kematian kepada penghuni rumah kedai tersebut. Namun begitu, melihat dari masa dan cara kebakaran itu bermula, dalam semua keadaan, tindak tanduk perayu adalah sangat membahayakan nyawa manusia yang mana dalam semua kemungkinan, tindakannya akan mengakibatkan kematian. Kematian merupakan kemungkinan praktik. Maka, tindak tanduk perayu termasuk dalam tafsiran membunuh di bawah s 300 Kanun (lihat perenggan 23 & 25); *Hyam v Director of Prosecutions* [1975] AC 55 (HL) diikut.]

Notes

For cases on s 300, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1474–1497.

Cases referred to

Chan Chwen Kong v PP [1962] MLJ 307, CA (refd)
Chang Kim Siong v PP [1968] 1 MLJ 36, FC (refd)
Hyam v Director of Prosecutions [1975] AC 55, HL (folld)

A *Jayaraman & Ors v PP* [1982] 2 MLJ 306, FC (refd)
Kalegura Padma Rao & Anor v The State of AP AIR 2007 SC 1299 (folld)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)

Legislation referred to

B Penal Code ss 299, 300
Penal Code [IND] s 300(4)

Appeal from: Criminal Case No 45–6 of 1998 (High Court, Shah Alam)

C *Mohd Firuz Jafrril (Firuz Jafrril, Aidil & Zarina) for the appellant.*
Saiful Edris Zainuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Arifin Zakaria CJ (Malaya) (delivering judgment of the court):

D INTRODUCTION

[1] This is an appeal by the appellant against the decision of the Court of Appeal delivered on 10 December 2007 whereby his appeal against his convictions and sentences imposed by the High Court was dismissed.
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[2] The appellant was charged with six counts of murder, by causing the death of six persons on 14 April 1997, at about 3.50am in a shop house at No 450A, Jalan 18/2A, Taman Seri Serdang, Hulu Langat, Selangor ('the shop house'). The six charges relate to the death of the following victims namely:
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(a) Koh Seik Lang (the appellant's mother in law);

(b) Khor Chai Peng (the appellant's maternal uncle);

G (c) Kee Sok Kiang (the appellant's wife);

(d) Khor Khim Im (the appellant's niece in law);

(e) Kee Kim Hup (the appellant's brother in law); and

H (f) Yeap Cheok Wei (the appellant's son).

THE FACTS

[3] The charges against the appellant arose out of the fire that gutted the shop house. Six victims perished in the said fire, which included the appellant's wife and son. There was no eye witness who saw the appellant started the fire. The evidence proffered by the prosecution is entirely circumstantial in nature; this may be summarised as follows:
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(a) First the evidence of PW7, a nurse by profession who was staying in the house opposite the shop house. She testified that at about 3.30am on the 14 April 1997, she switched on the light of her toilet, which was facing the shop house, as she wanted to go to the toilet, she saw the appellant who was wearing a white shirt. She saw the appellant from about 3 to 4 meters distance. He was seen descending the staircase on the right of the shop house. At that time the shop house was already on fire. She said she could recognise the appellant as she had seen him before. The appellant was alone and appeared to be in a hurry. In cross-examination, she referred to the appellant as 'orang gila' because he always quarrel with his wife whenever he was at home.

(b) Next, we have the evidence of PW9 (the petrol station attendant). He gave evidence that on 14 April 1997 at about 2.30am, the appellant came to the petrol station to buy petrol. He had with him four empty plastic containers. After filling up the four containers, he paid for it with a RM50 note and PW9 gave him back RM30 as change. The appellant then asked him to send him to his car, which he did using his motorcycle. He said two of the containers were placed in the basket of motorcycle and the other two were held by the appellant. After sending the appellant as requested, he did not know what happened further. Later on he attended an identification parade at which he identified the appellant as the person who came to buy petrol on the 14 April 1997.

(c) PW13 and PW14, the appellant's brother in law and sister in law, who were staying in the shop house testified that on the evening of 13 April 1997, the appellant had a series of quarrels with his wife, his mother in law and his brother in law (Kee Kim Hup). The quarrel started when the wife asked the appellant for a divorce. The appellant got furious when the wife chased him out of the shop house as she claimed it belongs to her. He claimed the shop house was his and threatened to make his brother in law a bankrupt when asked to leave the shop house. He refused to leave and said that he wanted to be there for three more days to be with his children. During the quarrel, the appellant's mother, two elder sisters and a younger brother were present. They left at around 12pm. The appellant stayed back in the shop house.

(d) PW12 who runs a photocopying business at No 449, Jalan Susur 18/2A, Taman Seri Serdang, next to the shop house confirmed the evidence of PW7 that the appellant and his wife often quarrelled and on the 14 April 1997 at about 3.30am, he heard a loud noise coming from a car leaving the shop house. He also heard the sound of broken glass.

(e) With regard to the cause of the fire, we have the evidence of PW6 (the government chemist) who gave evidence that he received several exhibits from PW18 which includes a white plastic container with a cover. He found 280ml of black liquid with pinkish tint. Upon analysis

he confirmed the liquid was petrol which, being exposed, had extensively evaporated. The liquid contained carbon particles.

(f) The operation officer of the Fire Service Department (PW15), who was responsible for the operation in putting out the fire on the day in question testified that the fire was caused by inflammable substances such as petrol which had spread through the staircase to the bottom. He was certain it was caused by a liquid chemical that was why it spread very quickly.

(g) The cause of death of the six victims as given by the pathologist (PW8) was smoke inhalation, this is based on his finding that their organs showed sign of soot.

FINDING OF HIGH COURTS

[4] At the end of the prosecution case, the learned High Court judge held that the prosecution had made out a prima facie case and the appellant was called upon to enter his defence. In his defence, the appellant stated that on the date in question he went to the shop house together with his Indonesian employee called Yu. While waiting for his wife to return to the shop house, Yu told him he was feeling hungry. He gave him RM50 to buy food and told him not to return to the shop house as he had a quarrel with his wife. He confirmed that his wife had asked for a divorce and wanted to keep his children and the business.

[5] His mother, two elder sisters and a younger brother were present in the shop house during the quarrel. His mother told him to let his wife have the business and after that his mother, sisters and brother left the shop house. He told his mother he wanted to stay there for three days because he wanted to be with his children. After taking his bath, he played video game on the staircase. He said he was feeling sad and he had drank stout.

[6] He then remembered that his car has ran out of petrol. He went to the petrol station on foot to buy petrol. As he was feeling tired, he asked the employee of the petrol station to send him back. He said he was feeling sad and not in the mood to fill up the petrol tank. He then walked to Sekolah Menengah Kebangsaan Sri Serdang where he met Yu. The school was about 1km from the shop house. He asked Yu to fill up the petrol tank. He also told Yu that he was not happy because the machines in the shop house belong to him and he told Yu, if possible, to destroy all the machines. He told Yu the key to shop house is in the car. About 20 to 30 minutes later, he saw the car being driven at a fast speed by Yu towards him. After stopping the car, Yu asked him to get into the car and he told the appellant that he could not drive the car because his hand was injured. He drove Yu to the construction site in

Puchong. In the car, Yu told him that after filling up the car, there was some petrol left and he went into the shop house and burned the machines in the shop house. He told Yu that his wife and children were in the shop house. He then wanted to turn back to the shop house but Yu stopped him from doing so and Yu asked him to send him back first.

[7] After sending Yu back to Puchong he drove the car aimlessly. At Subang Jaya, he came across a 7 Eleven shop. At the shop, he bought 100 Panadol tablets, two tins of Carlsberg and one tin of Guinness Stout. In his house in Shah Alam, he swallowed 30 Panadol tablets and the beer, and after that he said he fainted. He was awakened by his elder sister and elder brother. The sister told him what had happened. He was told that his son Yeap Cheok Wai died in the fire but his daughter was safe. He felt hungry and asked his brother to buy him food. After he had eaten the brother took him to the police station. He maintained that he did not asked Yu to burn anyone in the shop house and he did not ask Yu to set fire to the shop house.

[8] After considering the defence evidence the learned trial judge came to the conclusion that, based on the evidence before him, Yu never exists and because of that the appellant's story relating to the role played by Yu in burning the shop house was rejected.

[9] The Court of Appeal having heard submissions of counsel came to the conclusion that the circumstantial and corroborative evidence is overwhelming and on that premise affirmed the finding of facts by the learned trial judge.

[10] On the issue of whether the appellant is guilty of murder or culpable homicide the Court of Appeal came to the conclusion that based on the various authorities considered by the court, the facts in the present case would support the finding of the High Court that the appellant was guilty of murder as charged.

THE ISSUES BEFORE THIS COURT

[11] Two main issues were raised before us. Firstly, is the circumstantial evidence present in this case sufficient to convict the appellant for the offence charged? Relying on *Chang Kim Siong v Public Prosecutor* [1968] 1 MLJ 36, *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306 and *Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307 learned counsel for the appellant contended that there is insufficient evidence to support a conviction for murder. He maintained that there are material gaps in the prosecution case which render the conviction unsafe. This centres on the evidence of PW6 and PW15. On PW6 evidence, he contended that PW6 in his evidence stated

clearly that he could not determine the cause of the fire and where it started. As against this he said there is the evidence of PW13 and PW15. He contended that the trial judge and the Court of Appeal failed to consider the evidence of PW13 who stated that when he was leaving the shop house at 3.30am through the back door he said, 'Saya ada melihat wayar yang terbakar. Masa saya lihat wayar terbakar, ia sudah patah. Saya lihat wayar itu sudah terbakar dan terjatuh'. Whereas PW15, the operation officer of the Fire Department gave conflicting evidence. This was not considered by the courts below. In cross-examination he stated that 'Punca kebakaran adalah di bawah bidang kuasa kimia. Saya tidak setuju apabila peguambela kata punca kebakaran tugas Bomba'. Against this PW6, the chemist, testified that, 'memandangkan keadaan kebakaran yang sudah begitu teruk saya tidak dapat pastikan punca kebakaran'.

[12] However, despite his earlier statement that the cause of the fire is a matter for the chemist, PW15 in his evidence said that the fire was caused by an inflammable chemical. In his own words he stated:

> Dari segi pengalaman selama saya kerja selama 21 tahun sebagai ahli bomba dan juga pegawai punca kebakaran adalah bahan kimia yang mudah terbakar. Saya kata begitu setelah kenal pasti keadaan bangunan tersebut. Lepas kebakaran ada tanda-tanda yang boleh dikenal pasti.
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> Kesemua bangunan musnah sama sekali dalam jangka masa yang tidak lama. Api cepat merebak. Terdapat juga tanda-tanda di dinding bangunan dan bahan-bahan yang terbakar.
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> Keseluruhan bangunan yang terbakar hitam dan barang yang terbakar hancur dalam masa yang singkat.
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> Untuk bezakan sama ada bahan kimia atau letrik yang sebabkan kematian ialah bahan kimia cepat merebak. Letrik lambat merebak.
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> Dari pemerhatian saya di tempat kejadian ia tidak boleh dikatakan berpunca dari letrik. Keenam-enam mangsa yang dijumpai telah diserahkan kepada polis untuk diuruskan.

In re-examination he emphatically stated that he is convinced that the cause of the fire is an inflammable chemical.

[13] On the question of the alleged contradiction in PW15's, evidence the Court of Appeal observed as follows:

> [29] In the instant appeal, we are unable to identify any contradiction in SP15's evidence. The learned trial judge has had the audio visual advantange. He is entitled to accept the evidence of SP15 as credible. As a matter of fact, SP15's evidence that the six victims died as the direct result of the fire is consistent with and corroborated by the medical findings of the pathologist

(SP8) that the six victims' respective organs showed signs of soot, thereby confirming that smoke inhalation was the cause of death and the fact that the fire was caused by the petrol was corroborated by the evidence of the petrol station attendant (SP9) who had sold the petrol to the accused. There is no plausible reason for a public officer such as SP15 to lie in court and risk perjury, particularly in a trial involving capital punishment: see eg *Public Prosecutor v David Ackowuah Bonsu* [1998] 7 MLJ 451; [1999] 2 CLJ 677 (HC) per Hishamudin Yunus J.

The learned High Court judge and the Court of Appeal had analysed the evidence of PW6 and PW15 and they came to the conclusion that there was no conflict between the two. It is true that PW15 did say that the cause of fire is within the purview of the chemistry department and not that of his department. But in this case the chemist PW6 when asked about the cause of the fire in no uncertain term said that he cannot determine the cause of fire because the effect of the fire was too extensive. To quote his words:

Memandangkan keadaan kebakaran yang sudah begitu teruk saya tidak dapat pastikan punca kebakaran.

[14] In this regard we have to bear in mind that the chemist only examined the charred remain of the fire. He was not present during the fire.

[15] PW15 on the other hand was present at scene of the fire and helped to put out the fire. His evidence as to what he observed and smelt at the material time is highly pertinent and relevant to the fact in issue. Based upon that he expressed his opinion as to the likely cause of the fire. This is premised upon the facts that the fire spread rapidly and there was smell of petrol. He also noticed that the petrol had seeped through the staircase to the bottom and this had facilitated the spread of the fire.

[16] Together with this, we have the evidence of PW9, the petrol station attendant, who sold RM20 of petrol to the appellant. He told the court that the appellant used four containers for the petrol. PW9 also helped to send the appellant to his car. This took place at around 2.30am on the 14 April 1997. A neighbour, PW7, testified that at around 3.30am on 14 April 1997 when she got up to go to the toilet she heard some commotion at the back of her house. She noticed there was fire in the shop house. She also saw the appellant leaving the shop house in a hurry. The appellant was alone.

[17] Considering all the evidence before the court, the learned trial judge came to his finding that the fire was caused by petrol and that the appellant started the fire. We agree with the Court of Appeal that in the circumstances the finding of learned trial judge should not be disturbed as it was based on actual evidence and corroborated by material particulars by inference

reasonably and properly drawn from other evidence before the court. This finding we hold is fully supported by the evidence before the court.

[18] The appellant in his defence tried to push the blame for the fire on his worker by the name of Yu. The existence of Yu was never mentioned to the investigating officer and never raised in the cross-examination of the prosecution's witnesses. It was raised for the first time during the defence case.

[19] For those reasons the learned trial judge held that it was a mere fabrication. We agree with the Court of Appeal that the trial judge had, in the circumstances, rightly rejected the appellant's defence. On the above premises we find that there is no merit on the first ground of appeal raised herein.

Whether s 300 or s 299 of the Penal Code should apply

[20] The next issue is, whether on the evidence adduced, the act of appellant falls within the definition of murder in s 300 or culpable homicide in s 299. Applying *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 (FC), the Court of Appeal held that in starting the fire by means of petrol clearly brought about enormous degree of risk to the lives of the occupants. Thus the court ruled that:

> … the death caused thereby is not just a likely result. It is certainly the most probable result. It is therefore murder.

In *Tham Kai Yau*, Raja Azlan Shah FJ (as His Royal Highness then was) explained the distinctions between the provisions of s 299 and s 300 of the Penal Code. He said:

> Section 299 of the Penal Code enacts that a person commits culpable homicide, if the act by which the death is caused is done: (a) with the intention to cause death; (b) with the intention of causing such bodily injury as is likely to cause death; (c) with the knowledge that … the act is likely to cause death. Section 300 of the Penal Code defines murder as follows. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done: (1) with the intention of causing death; (2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; (3) with the intention of causing such bodily injury to any person, and … is sufficient in the ordinary course of nature to cause death; (4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death.
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> The words which I have italised show the marked differences between the two offences. Where there is an intention to kill, as in (a) and (1), the offence is always murder. Where there is no intention to cause death or bodily injury, then (c) and (4) apply. Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if

it is the most probable result, it is murder. Illustration (d) of s 300 of the Penal Code is a case of this description. Where the offender knows that the particular person injured is likely, either from peculiarity of constitution, immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause death, it is murder. Illustration (b) of s 300 of the Penal Code is a good example. The essence of (b) and (3) is this. It is culpable homicide if the bodily injury intended to be inflicted is likely to cause death; it is murder, if such injury is sufficient in the ordinary course of nature to cause death. Illustration (c) given in s 300 of the Penal Code is an example. It is on a comparison of these two limbs of s 299 and s 300 that the decision of doubtful cases as the present must generally depend. The distinction is fine, but noticeable. In the last analysis, it is a question of degree of probability.

Ratanlal & Dhirajlal's Law of Crimes, a commentary of the Indian Penal Code 1860, (26th Ed) writing on cl 4 of s 300 which is similar to s 300 of our Penal Code stated:

Clause 4 applies to a case of dangerous action without an intention to cause specific bodily injury to any person. The distinction between the first three clauses and the last clause is that whether in the former there is an intention to kill or to cause bodily injury, in the latter there is no such intention. It is designed to cover cases in which the agent not intending to cause death or to cause such bodily injury as is likely to cause death, has, nevertheless, caused death by an act knowing that it is so imminently dangerous that in all probability it will cause death.

[21] In *Kalegura Padma Rao & Anor v The State of AP* AIR 2007 SC 1299, at p 1305, the Supreme Court observed:

It will be sufficient to say that cl (4) of s 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

(See further *Ruli Ram v State of Haryana* AIR 2002 3360.)

[22] Applying the above guiding principles to the present case we are of the view that both the High Court and Court of Appeal had come to the right decision having regard to the facts as found by them. The appellant in this case may have no intention to cause the death or any bodily injury as is likely to cause death to the occupiers of the shop house but judging from the time and manner in which the fire was started, in all circumstances we are satisfied that it is so imminently dangerous to human lives and that in all probability it will cause death. In the circumstances death approximates to a practical certainty.

[23] In the case *Hyam v Director of Prosecutions* [1975] AC 55 (HL), a case cited by the Court of Appeal, the House of Lords held by majority of 3:2 that a person who, without intention to endanger life, did an act knowing that it was probably that grievous, in the sense of serious bodily harm would follow was guilty of murder if death resulted. In that case the facts were that the female appellant had a relationship with a man who became engaged to be married to B. In the early hours of 15 July 1972, the appellant went to B's house and poured petrol through the letter box, stuffed newspaper through and lit it. She gave B no warning but went home leaving the house burning. B escaped but her two daughters died of suffocation. The appellant was charged with their murder. Her defence was that she set fire to frighten B so that she would leave the neighbourhood. She was convicted of murder and her appeal against conviction was dismissed by the Court of Appeal and the House of Lords.

[24] The facts in the present case are no different to the case of *Hyam*— the appellant started the fire to the shop house in the early hours of the morning knowing full well that the shop house was occupied by so many people including his own wife and children. His act had put the lives of so many innocent people in grave danger. In the circumstances it cannot be denied that his act was so imminently dangerous and that in all probability it will cause death. It is our finding, therefore, that his act falls squarely within the definition of murder under s 300 the Penal Code.

CONCLUSION

[25] For the above reasons, we find no merit in this appeal, the appeal is therefore dismissed and the convictions and sentences imposed by the High Court are hereby affirmed.

Appeal dismissed.

Reported by Andrew Christopher Simon